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Supreme Court of the United States

OCTOBER TERM, 1963

No. 418

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SUNFIRE COAL COMPANY, a corporation, and
ASHLO COAL COMPANY, a corporation

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To Review the Judgment of the United States District Court for the Eastern District of Kentucky (Jackson) Pending Upon Appeal in, and Before Judgment of, the United States Court of Appeals for the Sixth Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, United Mine Workers of America (called "UMW"), prays that a writ of certiorari issue to the United State. Court of Appeals for the Sixth Circuit[1] to review the judgment of the United States District Court for the Eastern District of Kentucky (Jackson),[2] entered June 13, 1963, in its Case No. 284, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation,*[3] *Plaintiffs* v. *United Mine Workers of America, Defendant,* wherein that court overruled UMW's motion

[1]Herein called "Sixth Circuit".
[2]Herein called "district court" or "trial court".
[3]Plaintiffs are called "Sunfire" and "Ashlo", respectively. Collectively, they are called "Companies".

to vacate the final judgment and order previously entered in said case,[1] and to grant UMW a new trial based upon newly discovered evidence, UMW having duly appealed from such denial order and having docketed this case in the Sixth Circuit on August 3, 1963, where it is now pending, designated as Case No. 15,502 and styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees* v. *United Mine Workers of America, Defendant-Appellant*. The Sixth Circuit has not as yet rendered any judgment in said case, or set a date for hearing of said appeal.

A certified appendix record in Case No. 15,502, with the certificate of the Sixth Circuit's Clerk showing the case has been docketed but that no judgment has been rendered by that Court, is furnished herewith, in accordance with the Rules of this Court.

OPINION BELOW

The district court's opinion overruling the motion based upon newly discovered evidence appears in Appendix B to this petition and in the certified appendix record (15a).[2]

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[1] The district court, on June 7, 1961 entered judgment of $250,000.00 in favor of Sunfire and $14,000.00 in favor of Ashlo, both with costs; by order dated June 27, 1961 and entered June 28, 1961, denied UMW's motion for judgment in accordance with motions for directed verdict or for a new trial; and UMW appealed from said judgment and order and docketed its case in the Sixth Circuit, as Case No. 14,832, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees* v. *United Mine Workers of America, Defendant-Appellant*. On February 16, 1963, the Sixth Circuit affirmed the final judgment, and on June 10, 1963, denied UMW's petition for rehearing. Contemporaneously with the filing of the instant petition for certiorari, UMW has also filed a certiorari petition to review the Sixth Circuit's judgment of February 16, 1963 and its rehearing denial order.

The district court's judgment and order of June 7 and 28, respectively, appear in Appendix A hereto, pp. 1a, 2a.

[2] Wherever pagination is indicated without a letter in front of the page number, such as (15a), such reference is to the appendix record filed herein. Reference to the Appendices herein are indicated as "A" with the page then indicated.

JURISDICTION

The district court's order denying the motion seeking a new trial based upon newly discovered evidence was entered June 13, 1963; notice of appeal was filed June 27; the case docketed in the Sixth Circuit August 3, 1963; and the Sixth Circuit has not yet heard the appeal or entered any judgment therein.

This Court's jurisdiction is invoked under 28 USCA, Sections 1254(1) and 2101(c) and (e) and this Court's Rule 20.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

In their complaint, Companies alleged, "The Court has jurisdiction . . . by virtue of . . . Section 303" of the Act (4a, 6a).

The district court's jurisdiction to consider UMW's motion for a new trial based upon newly discovered evidence was pursuant to Rule 60(b), Federal Rules of Civil Procedure.

QUESTION PRESENTED

Where, in an action under Section 303, Labor Management Relations Act, 1947, money judgments are entered against a labor union by a federal district court based upon a jury verdict of union responsibility and damages for tortious conduct imputed to the union without proof of the persons guilty thereof or that such persons were union agents, and the union, by motion under Rule 60(b), Federal Rules of Civil Procedure, seeks a new trial and vacation of the money judgments on the basis of newly discovered evidence, disclosed for the first time more than a year following entry of the judgments in a police officer's affidavit introduced in a public hearing and in which affidavit the officer identifies persons, who were not

agents of the union sued, as having committed various tortious acts, some of which were testified to in the trial in which the money judgments were entered, should the district court wherein the motion is filed apply the provisions of subsection (2) of said Rule 60(b), which contains a one year limitation, or should it apply subsection (6) of said Rule which has no such time limitation?

STATUTES INVOLVED

28 USCA, Rule 60(b), Federal Rules of Civil Procedure, is involved, and is printed in Appendix C hereto, p. 6a.

STATEMENT OF THE CASE

1. THE JUDGMENTS INVOLVED

As already noted (*ante*, p. 1-2), UMW sought, on the basis of newly discovered evidence, to vacate money judgments entered against it by the district court on June 7, 1961 in favor of Ashlo and Sunfire, as well as the order of June 27, 1961 entered June 28, 1961 denying UMW's post-judgment motions. On June 13, 1963, the motion to vacate was overruled (A. 3a).

2. THE MOTION TO VACATE

From UMW's Motion to Vacate (4a *et seq.*), and the affidavits thereto, it appears:

In the jury trial the district court, over UMW objections, had permitted evidence to be introduced to the jury of shootings, of the burning of the Ashlo tipple, and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who had committed such acts and without proving UMW was in any wise connected therewith or was responsible therefor (5a). Such admitted testimony included that related by Marion Richie (Ritchie) that his

three tipples at Sassafras, Viper and Ulvah, Kentucky, were destroyed by dynamiting or burning in July or August, 1959; but did not identify any person responsible therefor (5a). Similarly, at least seven other coal operators were permitted to testify concerning property damages at their respective operations without proving who had committed such acts (5a).

On *April 3, 1963,* William Perkins furnished to Harrison Combs, of counsel for UMW, a copy of an affidavit of Ira Kilburn, a citizen and resident of Hazard, Perry County, Kentucky, which had been introduced as part of a deposition in a hearing conducted by the City Council of said city, in a proceeding to oust Kilburn as a lieutenant of the Hazard police force (6a, 12a). In the affidavit, Kilburn avows that he has had threats made against his life because of knowledge he had of "certain acts" committed during the 1959 strike (8a) and he identifies numerous individuals who, according to his affidavit, destroyed the tipples at Sassafras and Viper, Kentucky, and identifies numerous other persons who, according to said affidavit, engaged in sundry shooting, burning and dynamiting activities during the strike of 1959 (6a, 8a).[7] Kilburn names himself as a participant in three incidents (9a). The persons named in the Kilburn affidavit, as UMW is advised, at the time of the strike in 1959 were neither officers, members, employees nor agents of UMW. Some of the persons so identified were city police officers (12-13a); others were operators in the coal industry (6a, 12a).[8]

Kilburn's affidavit recites that he is "making this statement due to fear for my life and in the event that I should

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[7]The "Kilburn Affidavit" attached to the Motion is found in the certified Appendix record, p. 8a.

[8]Such information to UMW appears in the "Affidavit of William Perkins", which is found in the certified Appendix record, p. 12a.

lose my life, I want this statement presented to the Grand Jury for its consideration" (9a).

The notary of the Kilburn affidavit was H. B. Noble, a practicing attorney at Hazard, Kentucky, whose certificate attests that the affidavit was typed by him and that Kilburn "thereafter read the same, and then signed, acknowledged and delivered the same under oath to be true and correct" (10a). While the notary's certificate on the Kilburn affidavit bears date August 10, 1962 (10a), in the April 15, 1963 affidavit of H. B. Noble, attached to the motion to vacate (10-11a), Noble states he was consulted by Kilburn on August 10, 1962; *the consultation was on a professional basis as attorney and client;* and *the client "requested, prior to the preparation of the affidavit, that I keep secret that which he desired to make known to me";* and that "with this understanding" between them, the Kilburn affidavit was prepared (10-11a). Noble further avows (11a), consistent with the recitations of the Kilburn affidavit (9a), that when Kilburn's affidavit was prepared "the said Ira Kilburn informed" Noble "he had had threats made against his life and that he was afraid for his life and that he wanted the affidavit made in the event that anything should happen to him that the affidavit could be presented to the grand jury for its consideration" (11a). According to Noble, he "maintained the trust" placed in him by Kilburn and that "the same was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4)" (11a).[*]

In William Perkins' affidavit, Perkins avows he first learned of the Kilburn affidavit on March 22, 1963, after the local radio station had carried a news item about the hearing which had been held by Hazard's Board of Com-

[*]See "Noble Affidavit" in the certified Appendix record, p. 10a.

missioners, on charges filed against Kilburn as a member of the City Police force; that the news item stated an affidavit had been filed during the hearing which implicated a number of people as having participated in events occurring during 1959; that he (Perkins) then contacted attorney Combs and advised him of the news item; and that he later saw a copy of the affidavit filed in the hearing (12a).[10]

As the motion asserts, in the admitted absence of direct evidence that UMW agents were responsible for property damages, the jury verdict and judgments based thereon necessarily results from unwarranted inferences arising from picketing activities; and that if statements in the Kilburn affidavit are true, then statements therein and in the Perkins affidavit demonstrate that persons with no connection or agency with UMW engaged in activities of a character similar to those in the record and which persons are charged with committing some acts for which the jury held UMW liable and who could be found in a court proceeding to have committed the other activities attributed to and imputed to UMW without supporting evidence (7a).

The motion also asserts the matters presented are material and relevant and are not cumulative of evidence in the record; that "they have only recently been made available to UMW" which should be given the opportunity of presenting such matters in a new trial in the district court; and that if the motion be granted, UMW intends to subpoena Kilburn as a witness in the new trial to examine him concerning statements contained in his affidavit (6-7a).

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[10]Attached to William Perkins' affidavit is a copy of the Ira Kilburn affidavit (13a), which Perkins states is a copy filed "at the time of the hearing before The Board of Commissioners of the City of Hazard, Kentucky on March 21st, 1963" (13a).

3. PLAINTIFFS' RESPONSE TO UMW'S MOTION TO VACATE

In their response to UMW's Motion, plaintiffs asserted that:

> "The motion is based upon Rule 60(b)(2). The Rule provides that such motion must be made 'not more than one year after the judgment, order, or proceeding was entered or taken.' The judgment in this case was entered June 7, 1961, and the motion of defendant-appellant is therefore barred by the Rule under which it is proceeding" (14a).[1]

4. THE DISTRICT COURT'S MEMORANDUM AND ORDER

In its Memorandum, the district court rejected UMW's contention that Rule (60(b)(6), Federal Rules of Civil Procedure, governs (16a). It sustained plaintiffs' contention, declaring that the district court "is convinced that the defendant's motion comes too late to claim relief under Rule 60(b)" (16a). It reasoned that, "Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence", adding, "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions" (16a). It professed that "The sixth subdivision of Rule 60(b) is by its very language limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions" (16a), citing *Klapprott v. United States*, 335 U. S. 601 (1949); *Federal Deposit Insurance Corp. v. Alker*, 3 Cir., 234 F. 2d 113 (1956); *United States v. Karahalias*, 2 Cir., 205 F. 2d 331 (1953); *Federal Deposit Insurance Corp. v. Alker*, E. D. Pa., 30 F.R.D. 527 (1962);

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[1] Other grounds of objection asserted by plaintiffs were that defendant made no showing of diligence in trying to discover or produce Kilburn as a witness upon the trial; the material proffered in support of UMW's motion would not be competent or admissible; the alleged factual matter is merely collateral to the main issues in the case; and "evidence which defendant apparently hopes it could adduce upon a second trial is not of such a nature as would probably change the outcome", but is cumulative (14a).

Davis v. Wadsworth Construction Co., E. D. Pa., 27 F.R.D. 1 (1961). On June 13, 1963, the district court overruled UMW's motion (A. 13a). Review thereof is now sought by UMW.

REASONS FOR GRANTING WRIT

I.

Contemporaneously with the filing of the instant Petition, UMW is filing also a Petition for Writ of Certiorari in Case No. 14,832 wherein the Sixth Circuit approved the judgments and orders which UMW's motion herein seeks to vacate. In the petition to review the Sixth Circuit's approval, UMW has demonstrated, it believes, the lack of supporting proof for the verdict and the money judgments entered against UMW and that they are without benefit of proof identifying the tortfeasors and of proof of agency necessary to impute the unlawful acts to UMW. Herein the Kilburn affidavit attributes to identified persons the commission of tortious acts, some of which, as herein shown (*ante*, p. 5), were the subjects of proof upon which the jury verdict against UMW was based. If statements in the Kilburn affidavits are true, then UMW has not had a fair trial and, as stated in *Klapprott v. U. S.*, 335 U. S. 601, 615, it "is entitled to a fair trial".

II.

The district court's rejection of UMW's motion to vacate and to grant it a new trial because of newly discovered evidence on the ground that the motion was not filed within the one-year limitation of subsection (2) contravenes this Court's principles in *Klapprott* which mandate that lower court's give consideration under subsection (6) to the circumstances occasioning the delay. Though the district court's Memorandum declares, "Under the most liberal view, [the motion] can be characterized as no more than a motion for relief on the ground of newly discovered evidence", it did not explain why the circumstances in

the motion and the supporting affidavits did not bring the motion within subsection (6)'s broad language. Indeed, the Memorandum stated, "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions" (A. 4a). In the light thereof, the district court's denial is squarely in conflict with *Klapprott's* enunciation that "Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of 60(b) is broad enough to authorize the Court" to grant UMW a fair hearing (p. 615).

It is opposed in principle and result with Second and Sixth Circuits' cases, herein discussed (*post*, pp. 17-18).

III.

The district court's overruling the motion is erroneous.

Rule 60(b), Federal Rules of Civil Procedure, provides that "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"; and while the Rule provides that a motion based upon subsection (2) be made "not more than one year after the judgment, order, or proceeding was entered or taken", subsection (6) of Rule 60(b) provides that the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment" and the one-year period has no relation thereto.

While the Supreme Court's *Klapprott v. U. S.*, 355 U. S. 601, recites that one asserting grounds found in the first three subsections must do so "not more than one year after the judgment, order, or proceeding was entered or taken" (p. 613), the Court makes clear that subsection (6) of Rule 60(b) "vests power in courts adequate to

enable them to vacate judgments whenever such action is appropriate to accomplish justice" (p. 615). Though it was urged in *Klapprott* that the "one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect' " and the Supreme Court agreed the one-year limitation would control "*if no more than 'neglect' was disclosed*", in which event the broad "any other reason" clause of Rule 60(b) would not be available (p. 613), the Supreme Court believed, under the circumstances disclosed by the petition, the judgment "should not be considered only under the excusable neglect, but also under the 'other reason' clause of 60(b), to which the one year limitation provision does not apply" (p. 614).

It is thus obvious that *Klapprott*, cited by the district court (16a) as support for denial of UMW's motion, rejects the district court's action herein. Indeed, it supports the validity of UMW's assertion that the instant situation falls within the scope of subsection (6) and that the relief sought herein is not barred under subsection (2) which carries the one-year time limitation, as the district court's memorandum professes (15-16a).

As the motion recites, plaintiffs caused to be submitted to the jury numerous acts of violence in which witnesses did not identify the persons guilty thereof. Coal operators, both non-union and union, were permitted, over UMW objections, to testify concerning property damages at their respective operations, without evidence showing UMW's connection therewith or responsibility therefor. *No person was ever identified as having been connected with such activities.* UMW's motion, now under consideration, so alleges and, pertinently, plaintiffs' response neither contradicts nor challenges such allegations. Hence, in accord with *Klapprott's* command, the

Court "must accept as true the undenied allegations of the petitioner" (335 U. S. 604). Accord: *In re Cremidas' Estate*, DC, Alaska, 1953, 14 F.R.D. 15; *Stevens v. Stoumen*, DC, E.D. Pa., 1963, 32 F.R.D. 385. Similarly, as the Sixth Circuit's opinion of the main case upon appeal declared, "*The record discloses no positive evidence of the origin or of the originators of the fire*" which occurred at the Ashlo tipple; and it further recited, "there is circumstantial evidence which the plaintiffs claim support their contention that it was deliberately set by or at the instigation of the defendant" (*Sunfire Coal Co. v. UMWA*, 6 Cir., 313 F. 2d 108, 109). Likewise, the Sixth Circuit approved the admission of evidence concerning dynamitings at plaintiffs' premises although the tortfeasons were never identified (313 F. 2d 110).

So, too, the district court, over UMW objections, permitted a Kentucky State Police to testify he investigated a dynamiting or shooting in the Chavies area (which was away from the picket line at the Ashlo tipple) and that he stopped two persons and found they had several different types of ammunition in the car; and although he had not arrested them and did not think enough of the incident to charge either of the two men, at least one of whom was a UMW member, the Sixth Circuit's opinion declared, "the jury had a right to consider this evidence in determining whether there was a concert of action between the two individuals" (313 F. 2d 110). In view thereof, UMW submits it would be *equally relevant* for the jury to consider proof of the matters recited in the Kilburn affidavit to determine whether the jury believed that those identified by the State Trooper or those identified by Kilburn were responsible for the dynamiting or shooting in the Chavies area.

In the trial which resulted in the judgment and order

which UMW seeks herein to vacate, the district court told the jury, *inter alia*, "There was some evidence that was produced here about similar occurrences in other parts of the territory. There is some evidence of court procedures that resulted in somebody being imprisoned and fined. Those matters may be considered. They were introduced for your consideration, but they do not constitute *direct proof;*[12] they do not constitute proof that is substantive in support of these claims. They are worth considering if you think they are worth considering. *They may be considered as bearing upon whether or not there was a common plan in regard to the operations of this strike and the operation of the pickets*" (R. 348a).[13]

The burden of proving UMW's responsibility and liability of course was upon plaintiffs, and the district court so charged the jury (R. 347a). Since it was plaintiffs' theory that the jury was warranted in inferring such responsibility and liability from occurrences at places other than those at plaintiffs' operations, any evidence that persons, who were not UMW agents, in the coal field areas and at the time of the 1959 picketing were engaged in planned and designed violence activity is relevant to show to the jury that, absent positive and reasonable identification of the wrongdoers as being UMW agents, *it would be just as reasonable and probable that such persons, who were not UMW agents, had committed those wrongful acts for which UMW has been held liable.* This position is emphasized by the undisputed testimony that UMW's picketing was on a planned non-violence basis (R. 224a, 230a, 293-4a, 299a). With the evidence in such posture, the Sixth Circuit's rule that "A verdict should

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[12]All emphases herein are supplied.

[13]This reference is to printed Appendix filed by UMW in the U. S. Court of Appeals, 6 Cir., in Case No. 14,832 (*Sunfire Coal Co. v. UMWA*) and which was filed with this Court in UMW's Petition for Certiorari contemporaneously with its filing of the instant petition.

be directed against the party upon whom rests the burden of proof, where from the evidence the injury claimed could with equal probability have resulted from a cause upon which liability could not be predicated" (*Troutman v. Mutual Life Ins. Co. of N. Y.*, 6 Cir., 125 F. 2d 769, 773; *Gulf Refining Co. v. Mark C. Walker & Son Co.*, 6 Cir., 124 F. 2d 420, 425), would become pertinent and vital. Thus, proof of the affidavit's recitals at a new trial would require a result different from that accorded UMW in the original trial.

The affidavit of Ira Kilburn, attached to the instant motion, indicates clearly that acts of violence were committed on a wide-scale basis. The affidavit specifically identifies persons who burned "Ritchie's Tipple at Viper, Kentucky"; it recites also that "Ritchie's Tipple at Sassafras, Kentucky was burned by Ritchie's guards" (8a) and, relevantly, Marion Richie was one of the witnesses in the instant case, testifying he lost three tipples by burning, one at Viper, Kentucky, a second one at Sassafras, and the third at Ulvah, Kentucky (R. 126a). Certainly, under the circumstances of this case, a jury finding of UMW's responsibility and liability, based upon inferences, as the finding herein is, could not be regarded as either warranted or fair unless opportunity be given the jury to have such knowledge, and should the jury believe that those persons named or identified by Kilburn burned the Viper and Sassafras tipples, its further belief and inference that such persons also committed the other acts of violence would be as reasonable (if not more so since no UMW agent has been named) as believing that UMW agents did so, *particularly when there is no evidence of identification of any UMW member or agent.*

Indeed, the Kilburn affidavit identifies as one of four persons who burned the scale house at Sassafras, Ken-

tucky, one whose name is like that of a witness for plaintiffs in the instant case.*

Likewise, since, as the Sixth Circuit declared in its opinion in this case (313 F. 2d 109), "The record discloses no positive evidence of the origin or of the originators of the fire" at the Ashlo tipple, the jury should be afforded opportunity to register its belief and inference whether persons identified in the Kilburn affidavit also burned the Ashlo tipple.

Similarly, the Kilburn affidavit recites the commission of other acts of property destruction in an expansive program of dynamiting, of burning and of shooting, and identifies the persons connected therewith. Although plaintiffs had the burden of proving UMW's responsibility and liability, when *Flame Coal Co. v. UMW* (6 Cir., 303 F. 2d 39) was being argued in the Sixth Circuit a member thereof inquired of UMW counsel, in substance, that if the wrongful acts by unidentified persons were not committed by UMW agents, then who committed the acts. UMW submits that in light of the expansive program of destruction recited in the Kilburn affidavit in which persons are identified (none of whom are UMW agents, as William Perkins' affidavit recites and plaintiffs' response does not deny), the jury could believe that answer to the quaere above is found in the activities of persons named in the Kilburn affidavit and that the wrongful conduct attributed to UMW was committed by the persons so identified. Only by setting aside the final judgment and order entered by the district court, by its awarding UMW a new trial, and by its permitting a jury to consider evidence therein based upon the affidavit's recitals may it be said that a fair trial has been had in this case. As the Su-

*Counsel for plaintiffs in *Flame* also represent plaintiffs in the instant case.

preme Court stated in *U. S. v. Shotwell Mfg. Co.*, 355 U. S. 233, 241, "it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less."

Though plaintiffs in the district court sought to dissipate *Shotwell's* relevancy to the instant case, UMW submits that where, as herein, plaintiffs introduced and employed what they themselves admit is only circumstantial evidence to impute responsibility and liability upon UMW, and there is a post-judgment discovery of evidentiary matter which was not available because of its naturally secretive character and which could serve as a basis for jury belief that persons without legal relationship to UMW committed the wrongful acts, thus exculpating UMW to which has been imputed responsibility when no UMW agent has been named, the need "for a full exploration of where the truth lies" is as vital herein as in *Shotwell*. Indeed, as already noted (*ante*, p. 10), the district court's memorandum pertinently recites (A. 4a): "That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions."

It is not alone upon the newly discovered evidence that UMW bases its request for relief herein. Here such evidence, as the motion shows, was not available to UMW until more than one year after judgment was entered against UMW, when, *on March 22, 1963*, the affidavit's existence and its contents were announced publicly over a radio station after it was filed in a hearing on charges against Kilburn. Further, it was evidence of such type and character that persons with knowledge thereof would naturally keep it secret, thereby precluding its availability to UMW. Thus, the circumstances of

the case, as already pointed out, and the nature of the evidence, which the Kilburn affidavit indicates, invoke the provisions of Rule 60(b)(6), Federal Rules of Civil Procedure, which permits the relief for "any other reason justifying relief from the operation of the judgment" and, as already noted, under subsection (6) courts are vested with power "to enable them to vacate judgments whenever such action is appropriate to accomplish justice". *Klapprott v. U. S.*, 335 U. S. 615

Though it appears (*ante*, p. 4) that Kilburn's affidavit was prepared on August 10, 1962 by H. B. Noble (who was one of UMW's attorneys in the main case both in the district court and in this Court), Noble's affidavit herein recites the *consultation with Kilburn was on a professional basis as attorney and client* and on Kilburn's request "prior to the preparation of the affidavit, that" Noble "keep secret that which he desired to make known to me" and that "with this understanding", Noble prepared the affidavit (10-11a). Noble's affidavit further recites he "maintained the trust" and "the same was never divulged to anyone in keeping with this affiant's ethics and in accordance with" Kentucky Revised Statutes 421.210(4) [10-11a], which provides that "No attorney shall testify concerning a communication made to him, in his professional character, by his client or his advice thereon, without the client's consent; . . ."

The Sixth Circuit followed the *Klapprott* rule in *L. M. Leathers' Sons v. Goldman*, 6 Cir., 252 F. 2d 188 (1958). Therein, appellant brought an action in 1953 against appellee for a patent infringement. Following appellee's answer and counterclaim, the parties entered into an agreement by which appellant agreed to give appellee a free, non-exclusive, irrevocable license in return for appellee's dismissal of its counterclaim and stipulation

of a consent judgment and injunction. Pursuant to the stipulation, judgment was entered *April 26, 1954* and an injunction was issued pursuant to the judgment on *April 28, 1954*. However, no license was issued to appellee; and on *June 14, 1955* appellee filed its motion which, revised on November 4, 1955, asked the trial court, among other things, to set aside the injunction and judgment entered April 26, 1954 and to set an immediate trial of the action. The district court acquiesced and, in a new trial, dismissed the appellant's action. In an appeal to the Sixth Circuit, appellant complained the consent judgment and injunction were set aside more than a year and a half after entry of the judgment and service of the injunction; but the Sixth Circuit, pointing to the Supreme Court's *Klapprott*, approved the district court's action in setting aside the judgment and injunction and awarding a new trial, and declared that "Rule 60(b)(6) vests power in the court to enable them to vacate judgments whenever such action is appropriate to accomplish justice" (252 F. 2d 190).

Moore and Vestal's Moore's Manual (1962), pp. 1924-5, states that Rule 60(b)(6) "is to cover unforeseen contingencies; intended to be a means for accomplishing justice in . . . exceptional situations" and "is a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief . . ."

In *Radack v. Norwegian American Line Agency, Inc.*, 2 Cir., 318 F. 2d 538 (1963), plaintiff's action for damages arising out of injuries was dismissed for lack of prosecution; some *fifteen months* after dismissal plaintiffs moved for, and the district court granted, an order vacating such dismissal; and defendants appealed. Noting that Rule

60(b)(6) "gives the district court a 'grand reservoir of equitable power to do justice in a particular case' ", the Second Circuit declared that (p. 542):

> "Had notice of the entry of judgment been given . . . plaintiffs would have been forewarned of the necessity of moving to vacate within one year if they wished to preserve the grounds on which they could most heavily rely, namely, counsel's inadvertence or *excusable neglect*. Rule 60(b) relief acts as a corrective remedy, mitigating the harsh impact of calendar rules when a litigant's action is dismissed as a result of his counsel's neglect . . . and we hold that it is available in a case such as this."

The Second Circuit made clear (p. 543) that "If no notice of the entry of judgment was ever received by appellees, the district court had the power to vacate the judgment", and it remanded the case for the purpose of affording the appellants the opportunity of showing that notice had been given. It declared (p. 543):

> *"But if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under Rule 60(b)(6)."*

The circumstances set forth in the motion to vacate invite the exercise of the "grand reservoir of equitable power to do justice" in this case which the authorities above-cited show to be vested in district courts.

Authorities cited by the district court do not support its denial of UMW's motion.

The cases cited (16a) by the district court in its Memorandum denying UMW's motion to vacate do not support its conclusion that the circumstances of the instant situation fall outside the scope of Rule 60(b)(6).

As already observed (*ante*, pp. 10-11), *Klapprott's* rationale does not sustain the district court's action herein.

Nor is *Federal Deposit Insurance Corp. v. Alker*, 3 Cir., 234 F.2d 113 (1956) apposite. Therein, the district court had not passed on its power under Rule 60(b) to grant the motion for a new trial, and the appellate court declared, "It is not for a district judge thus to abdicate his function to interpret and apply the law" (p. 116). Allegations in the motion "were strongly controverted"; and unlike the instant case, where UMW filed affidavits in support of its motion, the appellate court observed the district court granted a new trial solely on unsupported allegations. Its directive required the district court to resolve the issues by receiving evidence and making full findings with respect to the facts alleged in the motion (p. 117). *The appellate court declared, "We, therefore, intimate no opinion as to whether we think the defendants can make out a case under clause* (6)" (p. 117).

In *Federal Deposit Insurance Corp. v. Alker*, DC, E.D., Pa., 1962, 30 F.R.D. 527, a companion case, the motion for a new trial was presented *more than ten years* after judgment was entered. In denying the motion, the district court pointed out that defendants had repeatedly filed various motions, aggregating more than a dozen, none of which had produced reversal or modification of the original judgment (p. 528); that "The difficulty with defendants' position is that all the arguments and evidence presented in this motion for new trial have been considered and rejected by previous courts" and "No essential argument presented here is new" (p. 531); and that "Even if all of the defendants' evidence is believed . . . the result of the case is not changed" (p. 531). In finality, the district court observed (p. 532): "Of additional importance here is this fact: even if all of defendants' allega-

tions are believed, defendants still have shown no legal defense to the claim. Thus, a new trial would produce only further delay with no possibility of a change in result".

Significantly, in *United States v. Karahalias*, 2 Cir., 205 F. 2d 331, cited by the district court, the Second Circuit emphasized the importance of petitioner's *time of being informed*, saying, on petition for rehearing, "Therefore, we hold as before that if Karahalias can prove that he was prevented from returning to the United States *from the time he learned of the action to cancel his citizenship the judgment must be opened*" (p. 335).

In *Davis v. Wadsworth Construction Co.*, DC, E.D. Pa., 1961, 27 F.R.D. 1, plaintiff contended that he was represented in his jury trial in 1956 by an unqualified counsel. The attorney's name had appeared on the roster of attorneys entitled to practice, but in 1959, the name was stricken from the role of attorneys of the federal court for the Eastern District of Pennsylvania because he was not a member, at the time of his admission, of the bar of the Supreme Court of a state or the Supreme Court of the United States. The opinion carefully observes the attorney's name had not been stricken because of unprofessional or otherwise improper conduct. In denying the motion for a new trial, the trial court found that the attorney had not been disbarred; and that "No circumstances have been advanced . . . to show that other counsel could have presented a case of liability" against the defendant therein (p. 4).

CONCLUSION

For the foregoing reasons, Petitioner prays that this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

September, 1963

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
JACKSON

Civil Action No. 284

SUNFIRE COAL COMPANY, a corporation, and
ASHLO COAL COMPANY, a corporation,
Plaintiffs,

v.

UNITED MINE WORKERS OF AMERICA,
Defendant.

Filed June 7, 1961

Judgment

In accord with the answers of the Jury to interrogatories submitted by the Court upon the conclusion of the trial of this action,

It is the judgment of the Court that the plaintiff Sunfire Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Two Hundred Fifty Thousand ($250,000) Dollars, and its costs herein, and

It is the further judgment of the Court that the plaintiff, Ashlo Coal Company, a corporation, have and recover of the defendant, United Mine Workers of America, the sum of Fourteen Thousand ($14,000) Dollars, and its costs herein.

This 7th day of June, 1961.

H. CHURCH FORD, *Judge*

Order, June 28, 1961

Order

Filed June 28, 1961

Pursuant to a previous assignment, the motion of the defendant for a judgment, or in the alternative for a new trial, having been brought on for hearing on Friday, June 23, 1961, and the Court having heard the argument of counsel for the parties, and having considered said motions, and being advised

IT IS ORDERED that the defendant's motion for judgment, and its alternative motion for a new trial, both be, and the same are denied.

This 27th day of June, 1961.

H. CHURCH FORD, *Judge*

NOTE: **The foregoing judgment and order appear in the Record of *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs v. United Mine Workers of America, Defendant*, Civil Action 284 in the United States District Court for the Eastern District of Kentucky—Jackson, and docketed in the United States Court of Appeals for the Sixth Circuit as Case No. 14,832, styled *Sunfire Coal Company, a corporation and Ashlo Coal Company, a corporation, Plaintiffs-Appellees v. United Mine Workers of America, Defendant-Appellant*. The judgment and order above appear in the Appendix filed by Appellant, United Mine Workers of America, at pages 12a and 17a, respectively.**

APPENDIX B

Filed June 13, 1963

Order

The motion of the defendant to vacate final judgment and order and award defendant United Mine Workers of America a new trial because of newly discovered evidence in each of the above styled cases is overruled.

See Memorandum.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge.
Serving by Designation

Filed June 13, 1963

Memorandum

The plaintiffs brought this action to recover for damages inflicted on their property through the wrongful conduct of certain employees and agents of the United Mine Workers of America (hereinafter UMW) in the course of the coal strike in the spring of 1959. The court entered judgment for the plaintiffs on October 10, 1961 and on November 30, 1961, overruled motions by the defendant for judgment or, in the alternative, for a new trial. On April 22, 1963, defendant filed a motion in this court to vacate the judgment and for a new trial based on newly discovered evidence.

Attached to the motion is an affidavit by a police officer from Hazard, Kentucky to the effect that certain acts of violence supposed to have been perpetrated by UMW agents were actually committed by persons having no connection with the UMW. The defendant maintains that such evidence would compel findings different from those already

made because the court has relied upon circumstantial evidence to connect the damage to the plaintiffs' property and the conduct of the defendant's agents, not upon specific identification of the wrongdoers.

Defendant cites Rule 60(b)(6), F.R.C.P. as the basis for its motion. Rule 60(b) provides that a court may relieve a party from the operation of a final judgment in five enumerated situations, one of which entails newly discovered evidence, and under a sixth subdivision which is a broadly worded catchall to cover situations not embraced in the preceding five subdivisions. The present question stems from the fact that the rule prescribes a one-year time limit for opening a judgment for newly discovered evidence, while there is no definite time limit on the sixth subdivision, the one on which defendant relies.

The court has examined the authorities submitted by both sides and is convinced that the defendant's motion comes too late to claims relief under Rule 60(b). Under the most liberal view, it can be characterized as no more than a motion for relief on the ground of newly discovered evidence. That the evidence is highly pertinent and that it would have a decisive effect on the final judgment are matters that must be taken for granted as to all such motions. The sixth subdivision of Rule 60(b) is by its very language limited to apply only to situations not covered by any of the other subdivisions and has been so construed by numerous court opinions. *Klapprott v. United States*, 335 U.S. 601 (1949); *Federal Deposit Insurance Corp. v. Alker*, 3d Cir., 234 F2d 113 (1956); *United States v. Karahalias*, 2d Cir., 205 F2d 331 (1953); *Federal Deposit Insurance Corp. v. Alker*, E.D. Penn., 30 F.R.D. 527 (1962); *Davis v. Wadsworth Construction Co.*, E.D. Penn., 27 F.R.D. 1 (1961).

In the case of Sunfire Coal Company, et al v. United Mine Workers of America, No. 284 on the docket at Jackson, Ky., a motion similar to that referred to in the above Memorandum is now pending. For the reasons set out in the above Memorandum, the motion should be overruled. An Order

overruling the motion in each of these cases is this day entered.

/s/ Mac Swinford
Mac Swinford
Chief Judge, U. S. District Court

/s/ H. Church Ford
H. Church Ford
Senior District Judge
Serving by Designation

NOTE: **The foregoing Memorandum was entered in both the instant case *Sunfire Coal Co. et al v. UMWA, No. 284*, and *also in R. P. Price et al d/b/a Elkhorn Coal Co. v. UMWA, Case No. 559* in the U.S District Court for the Eastern District of Kentucky (Pikeville), which is currently pending on appeal in the U.S. Court of Appeals, Sixth Circuit as Case No. 15,503.**

The Memorandum's first paragraph relates to judgments entered in the *Price et al case*, but it is made applicable to the instant *Sunfire* case in the concluding paragraph.

APPENDIX C

28 USCA. Federal Rules of Civil Procedure:

Rule 60. RELIEF FROM JUDGMENT OR ORDER

* * * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Office-Supreme Court, U.S.
FILED
SEP 25 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 448.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

SUNFIRE COAL COMPANY, a Corporation, and
ASHLO COAL COMPANY, a Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

JAMES S. GREENE, JR.,
Harlan, Kentucky.
LOGAN E. PATTERSON,
Pineville, Kentucky.
Counsel for Respondents.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTION PRESENTED.

In private litigation wherein plaintiffs have recovered a money judgment in a tort action, and defendant's pending appeal in a Court of Appeals involves only defendant's contention that its motion to vacate the judgment and grant it a new trial, based upon newly discovered evidence, was erroneously denied by the trial court as being barred by the time limitation imposed in Rule 60(b), Federal Rules

of Civil Procedure, is "the case of such imperative public importance as to justify a deviation from normal appellate processes" pursuant to Rule 20 of this Court?

STATEMENT OF THE CASE.

In view of the fragmentary portion of the record which is here certified, respondents challenge the propriety of that portion of the petitioner's statement of the case designated as "The Motion to Vacate," wherein petitioner undertakes to present a factual background based upon items gleaned from its own unverified motion, from the affidavit of one of its representatives, the affidavit of one of its attorneys, and the patently hearsay affidavit of one Ira Kilburn. As indicative of the impropriety of this technique, in the opinion of respondents, are the following:

1. A statement which appears on page 4 of the Petition for Writ of Certiorari, typical of similar repetitions throughout the Petition, to the effect that the trial court permitted the introduction of evidence concerning "shootings, of the burning of the Ashlo tipple, and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who had committed such acts and *without proving UMW was in anywise connected therewith or was responsible therefor* (5a)." This statement is reasonably calculated to lead to a false assumption. As stated on page 12, of the Petition, the Court of Appeals briefly remarked that there was circumstantial evidence claimed by respondents to support their contention that the Ashlo tipple was deliberately burned by or at the instigation of the petitioner. This circumstantial evidence was obviously sufficiently persuasive to convince the jury

that tried the case. It was obviously sufficient to persuade both the district court and the appellate court that the jury's verdict was supported by the evidence. To give the impression that there was no evidence whatever "in anywise" connecting the petitioner with the destruction of the respondents' tipple is entirely misleading, but since that portion of the record is not here certified, the respondents are unable to point out to the Court those items of evidence which strongly indicated the implication of the petitioner's members, agents and representatives.

2. Any indication that the disorders described in the Kilburn affidavit (8a-10a)* were closely linked with depredations described in the evidence upon the trial of this case is likewise misleading. Of all the occurrences described in the alleged Kilburn affidavit, only one was even mentioned in the evidence produced on the trial, and that was the testimony of Marion Richey, one of several witnesses who testified concerning widespread destruction of mining properties and equipment in the area, to the effect that three of his tipples were destryoed by fire, and he could not say who burned them.

3. It is worth noting that Kilburn's statement of his fear for his life is immediately followed (9a) by his statement that threats had been made by George Smith and R. D. Cisco, fellow police officers accused of misconduct in Kilburn's affidavit. Neither of these persons had anything to do with the trial of this case, nor were they ever mentioned throughout the trial.

---

* Respondents have adopted petitioner's reference system. When the page-number numeral precedes the small "a," reference is made to that portion of the record described by petitioner as the "appendix record."

4. It is further to be noted that Kilburn's affidavit was allegedly filed in some entirely unrelated proceeding before the Board of Commissioners of Hazard, Kentucky (12a), and he has made no affidavit in this proceeding, nor does anyone represent that he would substantiate in evidence the matter contained in his alleged affidavit. The petitioner merely says that, if granted a new trial, it intends to subpoena Kilburn as a witness, and there examine him concerning the statements in his affidavit.

Any inferences in the petitioner's statement of the case to the effect that the respondents have conceded, or that the trial court has determined that the proffered material appearing in Kilburn's affidavit would be admissible upon a new trial, or would be highly pertinent, or would have a decisive effect upon the final judgment, are, in the opinion of respondents, completely unjustified. The inaccuracy of such inferences is at least partially demonstrated by a reading of the entire memorandum of the trial court (3a, *et seq.*), and by reference to the complete response to the original motion of petitioner (13a-14a).

It is felt that the introductory part of the memorandum of the trial court (altered only to insert appropriate dates) states the case fully and with brevity, thus (15a-16a):

> "The plaintiffs brought this action to recover for damages inflicted on their property through the wrongful conduct of certain employees and agents of the United Mine Workers of America (hereafter UMW) in the course of the coal strike in the spring of 1959. The court entered judgment for the plaintiffs on June 7, 1961 and on June 27, 1961, overruled motions by the defendant for judgment or, in the alternative, for a new trial. On May 16, 1963, defendant

filed a motion in this Court to vacate the judgment and for a new trial based on newly discovered evidence.

"Attached to the motion is an affidavit by a police officer from Hazard, Kentucky to the effect that certain acts of violence supposed to have been perpetrated by UMW agents were actually committed by persons having no connection with the UMW. The defendant maintains that such evidence would compel findings different from those already made because the court has relied upon circumstantial evidence to connect the damage to the plaintiffs' property and the conduct of the defendant's agents, not upon specific identification of the wrongdoers.

"Defendant cites Rule 60(b)(6), F. R. C. P. as the basis for its motion. Rule 60(b) provides that a court may relieve a party from the operation of a final judgment in five enumerated situations, one of which entails newly discovered evidence, and under a sixth subdivision which is a broadly worded catchall to cover situations not embraced in the preceding five subdivisions. The present question stems from the fact that the rule prescribes a one-year time limit for opening a judgment for newly discovered evidence, while there is no definite time limit on the sixth subdivision, the one on which defendant relies."

THE ARGUMENT.

While the petitioner is asking this Court to issue a writ of certiorari before judgment by the Court of Appeals for the Sixth Circuit, under the provisions of Rule 20 which permits the granting of a writ under such circumstances "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court," no attempt is made by the petitioner, in the reasons stated in its petition for granting the writ, to demonstrate to the Court why this case falls within this exception of being one "of such imperative public importance" that it cannot await the orderly procedures established for appeal in the federal judicial system. Whether, in fact, it is such a case is the immediate question before the Court.

Shorn of such sensationalism and emotionalism as may be inherent in a detailed statement of factual background, regardless of whether fairly or unfairly presented, the precise ultimate question in this case is whether or not the petitioner's motion for new trial is barred by the one-year limitation stipulated in Rule 60(b).

That the petitioner's motion for new trial is based upon newly discovered evidence cannot possibly be denied. Its own description of its motion (4a) is: "Motion to vacate final judgment and order and award defendant United Mine Workers of America a new trial because of newly discovered evidence."

That this is a motion for a new trial based upon newly discovered evidence of the character described in Rule 60(b) is likewise completely beyond debate. The petitioner (then the moving party) thus stated to the trial court (5a):

"Pursuant to Rule 60(b), Federal Rules of Civil Procedure, UMW moves this Honorable Court to vacate and set aside the final judgment entered by this Court in the captioned case against defendant UMW on the 7th day of June, 1961, as well as its order dated the 27th day of June, 1961 and entered on the 28th day of June, 1961, denying UMW's Motion for Judgment in Accordance with Motions for Directed Verdict or for a New Trial, and to grant said defendant UMW a new trial based upon newly discovered evidence."

In final analysis, the petitioner is here saying that its motion, filed too late as a motion under subsection (2) of Rule 60(b), specifically dealing with newly discovered evidence, should be allowed under subsection (6) because (a) it feels that the anticipated new evidence would be highly significant in a trial where one of the elements of circumstantial evidence was a showing of a general pattern of property damage and violence, and (b) because it did not learn of the existence of such evidence until after the expiration of one year following the judgment.

To state their position abruptly, it is the contention of the respondents that, since this motion is obviously based upon newly discovered evidence which does not involve any element of misconduct or over-reaching on the part of the respondents, the motion is barred by the express limitation appearing in the rule regardless of how significant or persuasive the newly discovered evidence may actually be (assuming that it is available), and it is also barred regardless of the fact that the moving party could not have learned sooner of the availability of such evidence (assuming such fact to be true).

The authorities on this point are entirely clear and entirely in accord. In *Klapprott v. United States*, 335 U. S. 601, the Court was considering a case where a

naturalized citizen had been deprived of his citizenship upon a default judgment, rendered without the production of any evidence, and for some four years had been incarcerated and so harassed by governmental authorities as to make it virtually impossible for him to devote any attention to the defense of the denaturalization proceedings, or to seek any relief therefrom. The case arose upon his motion to vacate the default judgment. Among other things, the Government contended that his motion was based upon "excusable neglect," that a motion on such ground fell under subsection (1) of Rule 60(b), and that Klapprott was barred by the one-year limitation stated in Rule 60(b). This Court, however, pointed out that Klapprott's dereliction arose from circumstances which could not be rationally classified as "neglect." On the contrary, the Court pointed out, in substance, that Klapprott's very adversary in the denaturalization proceeding, and the very adversary who had taken a default judgment against him, by other and extraneous tactics of questionable propriety had made it virtually impossible for him to defend himself or to seek earlier relief in the denaturalization case. This was not a case of "neglect," the Court said, but fairly fell within the " 'other reason' clause of 60(b), to which the one-year limitation provision does not apply." [335 U. S. 614.] At the same time, however, the Court made it equally clear that, had the motion been based upon facts encompassed in the term "excusable neglect," the one-year period would have been inflexibly applied. It was said:

> "And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." [335 U. S. 613.]

Petitioner's incomplete quotation, inferring that the Court had indicated that the above rule should be relaxed whenever "appropriate to accomplish justice" does not convey the Court's true declaration. What the Court said, with our emphasis supplied, was: "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified*, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." [335 U. S. 614-615.]

In *United States v. Karahalias*, 205 F. 2d 331, Judge Learned Hand, first agreed with the petitioner's present contention regarding the availability of subsection (6) "to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do." However, upon a re-reading of this Court's opinion in the *Klapprott* case Judge Hand decided that his original interpretation was entirely in error, and that this Court had declared "that subsection (6) did not toll the limitation of the Rule upon any kind of 'neglect,' whatever the excuse might be." Petitioner quotes briefly from this case, choosing to emphasize what it calls "the importance of petitioner's time of being informed." The key words in this sentence, and those upon which the decision turn, in respondents' opinion, should be thus emphasized. "Therefore, we hold as before that if Karahalias can prove that *he was prevented* from returning to the United States from the time he learned of the action to cancel his citizenship the judgment must be opened." Manifestly the court was not primarily concerned with time, but rather with prevention, and that prevention would have no significance until the litigant was informed of a development requiring action which he was prevented from taking.

From *Radack v. Norwegian American Line Agency, Inc.*, 2 Cir., 318 F. 2d 538, the petitioner deduces that the Second Circuit Court of Appeals has enunciated a principle to the effect that Rule 60(b)(6) confers such a "grand reservoir of equitable power to do justice in a particular case" that the limitations imposed upon subsection (2) motions may be overlooked in any instance where the court feels it must do "justice." Respondents do not so interpret this case. In that case suit had been dismissed for lack of prosecution. Some fifteen months later, learning of the dismissal, plaintiffs moved to vacate the order of dismissal. It was contended that the motion fell under subsection (1) of Rule 60 (b), and was therefore barred. However, the court pointed out that, in violation of Rule 77(d) F. R. C. P., no notice had been given of the entry of the dismissal, and that the practice and rules of the trial court were at variance with the official Rules. The court decided that, since the party had been denied a right specifically conferred by law, a reopening of the case under Rule 60(b)(6) was proper. To illustrate that the petitioner's interpretation of this opinion cannot be successfully maintained, reference can be made to *Costa v. Chapkines*, 316 F. 2d 541. That case was in the same court (United States Court of Appeals, Second Circuit), involved the same type of procedure (motion to vacate dismissal of plaintiffs' action for want of prosecution), and was before the same identical judges. However, it did not involve a failure to give notice under Rule 77(d) F. R. C. P. In the *Costa* case, appellant's motion, made more than a year after dismissal of the action, was based upon the allegation that their attorney had been seriously ill and had died. In such a case the court said:

> "Their motion must be read as coming clearly within subdivision (1) of the Rule 60(b). Fed. R.

Civ. Pro., providing for relief from judgment in cases of "[M]istake, inadvertence, surprise, or excusable neglect." As such, the motion made over one year after judgment was untimely. When the grounds for relief fall within subdivisions (1), (2) or (3) of Rule 60(b), the Court is restricted by the one-year limitation and cannot grant relief under subdivision (6) which allows motions to be made within a reasonable time."

In *Moore's Federal Practice*, Volume 7, page 321, it is said:

> "This maximum period of one year is not subject to enlargement by the court; and may not properly be circumvented by a utilization of any of the other clauses, (4), (5), or (6), which are subject only to a reasonable time limitation, where the reason for relief is embraced within clauses (1), (2), or (3)."

Again, in the same volume, page 295, it is made clear that sub-clause (6) should not be used to extend the time limitation applicable to clauses (1), (2) and (3):

> "In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matter not covered in the preceding five clauses. Further the maximum time limitation of one year that applies to clauses (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3)."

In *Barron & Holtzoff*, Volume 3, Federal Practice and Procedure, page 421, it is said:

> "A motion under clauses (1), (2) or (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable."

The principles expounded in these well-regarded texts are fully in accord with this Court's pronouncements in the *Klapprott* case, and so far as respondents have been able to discover, there are no authorities to the contrary.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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